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IN THE
Supreme Court of the United States

DENISE ARGUELLO and ALBERTO GOVEA
Petitioners,

v.

CONOCO, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* AND BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW; MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND; PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, INC.; NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM; PUBLIC JUSTICE CENTER; AND SOUTHERN POVERTY LAW CENTER; AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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IN THE
SUPREME COURT OF THE UNITED STATES

Denise Arguello and Alberto Govea,

Petitioners,

v.

Conoco, Inc.,

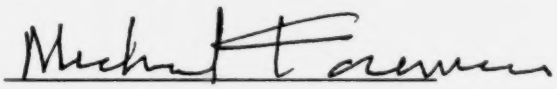
Respondent.

MOTION FOR LEAVE TO FILE A BRIEF *AS AMICI CURIAE*

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee"), the Mexican American Legal Defense and Educational Fund, Puerto Rican Legal Defense and Education Fund, Inc., the National Asian Pacific American Legal Consortium, the Public Justice Center and the Southern Poverty Law Center move for leave, pursuant to Rule 37.2 (b) of the Rules of the Supreme Court of the United States, to file a brief as *amici curiae* in support of Petitioners in order to place before the Court relevant matter that has not already been brought to its attention.

The interest of the *amici* in the issues raised here are longstanding and a decision of the Court will impact literally millions of constituents served by the *amici*. The interests of the proposed *amici* are set forth in the Statement of Interest herein.

The Lawyers' Committee has a continuing interest in this case having filed an *amicus curiae* brief before the Fifth Circuit Court of Appeals and presented argument before the Fifth Circuit. We file herewith a letter of consent from Petitioner's Counsel. The Respondent opposes the filing of this *amici curiae* brief.



Michael L. Foreman

October 6, 2003

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INTEREST OF THE AMICI CURIAE

The proper construction of 42 U.S.C. §1981 lies at the heart of the missions of the *amici curiae*.[1] Section 1981 embodies the core principles that guided the rebuilding and healing of our nation after the abolition of slavery and the end of the Civil War. The 1991 Amendment to § 1981 reinforced this nation's reliance on this statute as a powerful weapon toward eradicating racial discrimination in retail contracts. While all statutes are to be construed to effectuate their legislative purposes, this principle of statutory construction is particularly significant for a statute enacted to serve the essential national purpose of ending racial discrimination.

The *amici* all have a historical dedication toward the elimination of discrimination against persons of color in all aspects of public life. The *amici* represent, literally, millions of people of color who are protected by, and would be harmed by an unjustifiably narrow interpretation of §1981.

The Lawyers' Committee for Civil Rights Under Law (Lawyers' Committee) is a tax-exempt, nonprofit civil rights organization that was founded in 1963 by the leaders of the American bar, at the request of President Kennedy, in order to help defend the civil rights of minorities and the poor. Through the Lawyers' Committee and its Affiliates, hundreds of attorneys have represented thousands of clients in civil rights cases across the country, challenging racial discrimination in virtually all aspects of American life,

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[1] Counsel for the *amici curiae* authored this brief in its entirety. No person or entity other than *amici curiae*, their staffs, or their counsel made monetary contribution to the preparation or submission of this brief. A copy of the Petitioner's letter of consent is filed herewith. As stated in the motion to file this brief, the Respondent has not consented.

including racial discrimination cases brought under 42 U.S.C. § 1981.

The Mexican American Legal Defense and Educational Fund ("MALDEF") is a national civil rights organization established in 1968. Its principal objective is to secure, through litigation, advocacy, and education, the civil rights of Latinos living in the United States. MALDEF has litigated numerous cases under 42 U.S.C. § 1981 since the organization's founding. Preserving the rights of Latinos to be free of discrimination in all aspects of social interaction is a primary goal of MALDEF's efforts.

The Puerto Rican Legal Defense and Education Fund, Inc. ("PRLDEF") is a national non-profit civil rights organization founded in 1972. PRLDEF is dedicated to protecting and furthering the civil rights of Puerto Ricans and other Latinos through litigation and policy advocacy. Since its inception, PRLDEF has participated both as direct counsel and as *amicus curiae* in numerous cases throughout the country concerning the proper interpretation of the civil rights laws.

The National Asian Pacific American Legal Consortium ("NAPALC") is a national non-profit, non-partisan organization whose mission is to advance the legal and civil rights of Asian Pacific Americans. Collectively, NAPALC and its Affiliates, the Asian Law Caucus and the Asian Pacific American Legal Center of Southern California, have over 50 years of experience in providing legal, public policy, advocacy, and community education on discrimination issues. NAPALC and its Affiliates have a long-standing commitment in addressing matters of discrimination that have an impact on the Asian Pacific American community, and this interest has resulted in NAPALC's participation in a number of *amicus* briefs before the courts.

The Public Justice Center (PJC) is a non-profit civil rights and anti-poverty legal services organization dedicated to protecting the rights of the underrepresented. Established in 1985, the PJC has used impact litigation, public education, legislative advocacy, and appellate advocacy to accomplish law reform for its clients in the areas of civil rights, disability rights, housing, employment, health care, and children's rights. The PJC has a long-standing commitment to fighting discrimination on the basis of race and national origin.

The Southern Poverty Law Center ("The Center"), founded in 1971, is a national, non-profit organization dedicated to combating intolerance and discrimination through litigation and education. The Center has litigated dozens of death penalty cases and numerous pioneering civil rights cases on behalf of women, minorities, immigrants, factory workers, poor people in need of health care, mentally ill persons, children in foster care, prisoners facing barbaric conditions of confinement and many other victims of injustice. The Center has litigated and won six landmark civil rights lawsuits before the United States Supreme Court, including the recent case *Hope v. Pelzer*, 122 S. Ct. 2508 (2002).

The efforts of the *amici* helped persuade Congress to enact the Civil Rights Act of 1991. A major purpose of that legislation was the restoration of 42 U.S.C. § 1981 as a viable remedy for racial discrimination at all stages, and in all aspects, of contracting. This Court should grant certiorari to resolve the current split in the circuits and to ensure there is a consistent national application of § 1981 honoring its legislative intent.

SUMMARY OF ARGUMENT

The question concerning the scope of protection from discrimination afforded by 42 U.S.C. § 1981 demands the attention of the Court.[2] The petition for certiorari should be granted to address the inconsistent application of this federal law by the courts of appeal and the continuing discrimination experienced by millions of consumers of color.

The plain meaning and legislative purpose of § 1981 supports meaningful federal protection in retail contexts. The legislative purpose of this historical statute was to ensure that freed slaves had access to economic opportunities that white customers already enjoyed. Congress, in 1991, affirmed this purpose by amending the law to clarify any confusion about its scope.

Nevertheless, the circuits are split resulting in inconsistent applications of this important civil rights law. These compromised interpretations of § 1981 further exacerbate documented racial discrimination that continues to exist in the retail setting.

ARGUMENT

"[A] dollar in the hands of a Negro [should] purchase the same thing as a dollar in the hands of a white...."[3]

In the context of analyzing the scope and purpose of § 1981 as a means to fulfill the promise of freedom made by the Thirteenth Amendment, the Court made this predictive

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[2] The petition for certiorari raises two distinct questions: (1) the scope of 42 U.S.C. § 1981 in the retail context; and (2) the scope of 42 U.S.C. § 2000(a). While the *amici* believe both questions warrant this Court's review, here the *amici* only address the importance of question one.

[3] *Jones v. Alfred H. Mayer, Co.*, 392 U.S. 409, 443 (1968).

statement. This Court should grant certiorari to ensure this recognized purpose of remedying discrimination which prevented freed men from exercising their "great fundamental rights" and to "go and come at pleasure" [4] continues to have meaning. Further, this Court should ensure that this important civil rights law is consistently applied across our nation resolving the split in circuits over its proper scope.

The Fifth Circuit Court held that Ms. Arguello and Mr. Govea, the petitioners, failed to show their actual ability to contract was interfered with despite the fact that the respondent's employee racially harassed them throughout their encounter in a store. *Arguello v. Conoco, Inc.*, 330 F. 3d 355, 356-57 (5th Cir. 2003). Section 1981 is intended to empower all persons to contract without suffering race discrimination. The Court must intervene to define the appropriate boundaries of § 1981 and to protect consumers in a manner that discourages racial discrimination in all aspects of a contractual relationship.

I. THIS COURT SHOULD ENSURE A CONSISTENT NATIONWIDE APPLICATION OF THIS HISTORICALLY IMPORTANT CIVIL RIGHTS STATUTE IN ACCORDANCE WITH ITS PLAIN MEANING AND LEGISLATIVE INTENT.

42 U.S.C. § 1981, one of our nation's first federal civil rights statutes, should be consistently applied nationwide. Section 1981 commands that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce

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[4] *Jones*, 392 U.S. at 437 (after reviewing the legislative history of the Civil Rights Act of 1866, the Court concluded it should "accord [§1981] a sweep as broad as its language").

contracts as is enjoyed by white citizens." 42 U.S.C. § 1981(a). In *Patterson v. McLean Credit Union*, 491 U.S. 164, 171 (1989), the Court limited the reach of §1981 holding that ". . . §1981 [did] not apply to conduct which occurs after the formation of a contract and which does not interfere with the right to enforce established contract obligations."

Congress immediately responded with an amendment which clarified the statute's purpose and scope -- to prohibit discrimination in all aspects of a contractual relationship. Congress clarified that § 1981 prohibits discrimination in "the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b). Further clarifying, Congress provided that: "the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of ***all*** benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981 (b) (emphasis added).

The Fifth Circuit's narrow application of § 1981 strips the congressional intent from this statute and is at odds with the broader interpretation taken by other circuits.

II. THE CURRENT SPLIT IN CIRCUITS EXTENDS ONLY LIMITED PROTECTION FROM RACIAL DISCRIMINATION IN CONTRACTING TO CONSUMERS IN SOME CIRCUITS WHILE THOSE IN OTHER CIRCUITS ARE PROTECTED FROM RACIAL DISCRIMINATION IN ALL ASPECTS OF THE CONTRACTING PROCESS.

This Court should act to correct the growing inconsistency of how § 1981 prohibits racial discrimination in retail contexts. Circuits that appear to adopt the narrow

interpretation of the Fifth Circuit undermine the federal protection once assured to African Americans, while other circuits continue to interpret § 1981 more broadly. In contrast to the narrow interpretation adopted by the Fifth and Eighth Circuits, the First[5], Third, Sixth, and Tenth Circuits recognize the explicit intent of Congress that § 1981 protects individuals from all racial discrimination in all aspects of the making of retail contracts. These circuits have applied § 1981 protection to retail claims in recognition that minority customers should enjoy the same contract conditions as white customers, whether they complete their transactions or not.

For some circuits, § 1981 extends protection to conditions and terms before and after a consumer's purchase. The Third Circuit, for example, held that a bank customer's § 1981 claim was actionable where police photographed him because of his race. According to the Third Circuit, "§1981 obligates commercial enterprises to extend the same treatment to contractual customers 'as is enjoyed by white citizens.'" *Hall v. Pennsylvania State Police*, 570 F.2d 86, 92 (3d Cir. 1978).

The Sixth Circuit, likewise, appears to take a broad interpretation of § 1981. For example in *Watson v. Fraternal Order of Eagles*, 915 F.2d 235 (6th Cir. 1990), the Sixth Circuit held that a private club's removal of two black guests to prevent them from purchasing soft drinks denied them the equal right to contract. *Watson*, 915 F.2d at 243. The court found the fact that the plaintiffs were never refused service to be insignificant because § 1981 protects African Americans from behavior aimed at avoiding contracting with them. *Id.* The Sixth Circuit recently reaffirmed *Watson* and clarified the broadness of §1981's reach in a well reasoned discussion of the plaintiff's *prima*

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[5] See discussion *infra* for a more detailed analysis of the position taken by the First Circuit.

facie case. *Christian v. Wal-Mart Stores, Inc.*, 252 F.3d 862, 867-73 (6th Cir. 2001). The Sixth Circuit explained that the *prima facie* case "which makes actionable the deprivation of service, as opposed to an outright refusal of service, better comprehends the realities of commercial establishment ...." *Id.* at 873.

The Tenth Circuit, also, appears to have adopted a broad interpretation of the scope of § 1981's protections. In *Hampton v. Dillard Dep't Stores, Inc.*, 247 F.3d 1091 (10th Cir. 2001), the Tenth Circuit acknowledged that § 1981 is applied "to remedy 'any act of discrimination committed in the making or the performance of a contract.'" *Id.* at 1118 (citations omitted). At least one lower court has read *Hampton* as suggesting "that a section 1981 claim is actionable where different conditions are placed upon an African-American plaintiff's right to enter contractual relations, even when that plaintiff eventually enters the contract." *Kelly v. Bank Midwest, N.A.*, 161 F. Supp. 2d 1248, 1256 (D.Kan. 2001)[6]

Other lower courts have also held that 1981's application is not limited to the precise moment of contract formation. *See e.g. Joseph v. New York Yankees Partnership*, No. 00 Civ. 2275 (SHS) (S.D.N.Y. Oct. 19, 2000), 2000 U.S. Dist. LEXIS 15417; *Bobbitt v. Rage Inc.*,

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[6] Contrary to the Tenth Circuit Court of Appeals' characterization of the arguments made by the Lawyers' Committee for Civil Rights Under Law in *Hampton*, 247 F. 3d at 1118, the Lawyers' Committee for Civil Rights Under Law did not argue that § 1981 protects customers from racial harassment merely based upon a person's entry to a retail establishment. Rather the argument made there was that if a racial minority is subject to different treatment, not endured by whites, which interferes with the opportunity to contract, a § 1981 claim is made. In a racial harassment context, the harassment is a hoop through which minority customers have to jump that is not required of non-minority customers. The minority customers are required to "run a gauntlet of [racial epithets] in return for the privilege of being allowed to [purchase goods or services]." *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986).

19 F. Supp. 2d 512, 518-20 (W.D.N.C. 1998); *Washington v. Duty Free Shoppers, Ltd.*, 710 F. Supp. 1288, 1289-90 (N.D. Cal. 1988).

Nevertheless, at least one circuit court appears to have adopted the Fifth Circuit's restrictive approach requiring an outright refusal to contract. The Eighth Circuit has suggested that, "once the purchase is completed, no contractual relationship remains." *Youngblood v. Hy-vee Food Stores, Inc.*, 266 F.3d 851, 854 (8th Cir. 2001).

The First Circuit decision in *Garrett v. Tandy Corp.*, 295 F.3d 94, 101- 02 (1st Cir. 2002) demonstrates the confusion created by the circuit split. In first addressing the restrictive interpretation of the Fifth and Eighth Circuits, the First Circuit observed "[w]e are not comfortable with all of these outcomes, nor do we make a wholesale endorsement of the reasoning employed by these courts." *Garrett*, 295 F.3d at 100. Then, appearing to adopt the more expansive approach of the Sixth Circuit, the *Garrett* court observed

> The 1991 expansion of the definition 'make and enforce contracts' in section 1981, then, extends the reach of the statute to situations beyond the four corners of a particular contract; the extension applies to those situations in which a merchant, acting out of racial animus, impedes a customer's ability to enter into, or enjoy the benefits of, a contractual relationship.

Garrett, 295 F.3d at 100 (citing *Christian*, 252 F.3d at 872.) The *Garrett* court concluded, however, that "[i]n the last analysis, however, the doctrinal rule established in these cases seems sound, even if the application of the rule is questionable." *Id.* The enforcement of one of the nation's premier civil rights laws should not depend on interpretations and applications that are "questionable."

The Courts adopting a narrow interpretation of § 1981 limit its application to the actual formation of the contract. Also, these Courts have not only narrowly focused on the precise instant the contract is consummated, but also failed to recognize that actions both preceding and following this precise moment can also "interfere with the ability to make contracts." 42 U.S.C. §1981(b).

The result of this split among the circuits is that people do not enjoy the same protection against race discrimination in some circuits as they do in others, even though a federal statute exists to shield them from this discrimination. 42 U.S.C. §1981(1991). This Court should address the absurd reality in the circuits adopting this narrow interpretation of § 1981, that a merchant may exercise any form of racial harassment against consumers and § 1981 is not violated as long as they actually complete the contract.

III. RACIAL DISCRIMINATION IN RETAIL CONTEXTS IS A SIGNIFICANT AND CONTINUOUS PROBLEM THAT WARRANTS ATTENTION BY THIS COURT.

Our nation's intent that persons of all races have an equal opportunity to enter into contracts is not in dispute. *See generally Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) (explaining the legislative history and Congress's intent for the Civil Rights Act of 1866). *See also Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989) (the Supreme Court "reaffirm[s] that § 1981 prohibits racial discrimination in the making and enforcement of private contracts); *Runyon v. McCrary*, 427 U.S. 160, 168 (1976) (declaring that "it is now well established that s 1 of the Civil Rights Act of 1866, 14 Stat. 27, 42 U.S.C. s 1981, prohibits racial discrimination in the making and enforcement of private contracts.")

Unfortunately, the disparate shopping and dining experiences of people of color have been well documented in contemporary television news magazines, such as "Prime Time Live" and "20/20," which have reported the harassment and animus associated with being a consumer of color in the United States.[7] These types of experiences are not just fodder for popular culture debate but have been analyzed in many of our nation's academic journals. These academic studies bolster the perception of some consumers of color that they are being treated differently.[8]

Indeed, an electronic legal search uncovered in excess of 100 articles discussing the uneven application of the protections afforded by § 1981 in the retail contracting context.[9] In short, the experiences of Ms. Arguello and Mr. Govea are not isolated examples of racial discrimination in retail establishments but are only part of a pervasive and harsh reality. The treatment they received illustrates that the

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[7] Anne-Marie G. Harris, *Shopping While Black: Applying 42 U.S.C. § 1981 to Cases of Consumer Racial Profiling*, 23 B.C. Third World L.J. 1, 3 (2003).

[8] Ian Ayers, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 Harv. L. Rev. 817 (1991).

[9] The search was performed using LexisNexis on September 23, 2003. In addition to the law review articles cited *infra*, some of the most current and relevant articles are as follows: Deseiree Kennedy, *Consumer Discrimination: The Limitations of Federal Civil Rights Protection*, 66 Mo. L. Rev. 275 (2001); Amanda G. Main, *Racial Profiling in Places of Public Accommodation: Theories of Recovery and Relief*, 39 Brandeis L.J. 289 (2000-2001); Regina Austin, *Bad for Business: Contextual Analysis, Race Discrimination and Fast Food*, 34 J. Marshall L. Rev. 207 (2000); Matt Graves, *Purchasing While Black: How Courts Condone Discrimination in the Marketplace*, 7 Mich. J. Race & L. 159 (2001); Mary Anne Case, *Developing a Taste for Not Being Discriminated Against*, 55 Stan. L. Rev. 2273 (2003) (a book review symposium on the Ian Ayers book Pervasive Prejudice? Unconventional Evidence of Race and Gender Discrimination); Nan D. Hunter, *Accommodating the Public Sphere: Beyond the Market Model*, 85 Minn. L. Rev. 1591 (2001).

descendents of slaves and similarly situated people of color still battle disrespect, racial slurs, and suspicion in the marketplace.

African-American and Latino shoppers experience consumer racial profiling and racial harassment throughout the United States. Some merchants place additional burdens on consumers of color, such as, having their race recorded when making purchases with a check[10] and waiting longer for customer service. [11] Even though a federal statute exists to prohibit discriminatory treatment in consumer settings, circuits still differ on the boundaries of protection for communities of color.

This Court should grant the petitioners writ of certiorari not only to speak on this issue which affects the day-to-day lives of millions of Americans, but also to provide a consistent application of §1981 by resolving the split in the circuits.

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[10] *Roberts v. Wal-Mart Stores, Inc.*, 769 F.Supp. 1086, 1087-89 (E.D. Mo. 1991).

[11] Thomas Ainscough & Carol Motley, *Will You Help Me Please? The Effects of Race, Gender and Manner of Dress on Retail Service*, 11 Marketing Letters 129, 135 (2000).

CONCLUSION

For the foregoing reasons, as well as those stated in the Brief for the Petitioner, this Court should grant the petition for a writ of certiorari.

Respectfully Submitted,

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